IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 5, 2000 Session

JACKIE ROBINSON v. PATRICK J. LECORPS, M.D.

Appeal from the Circuit Court for Davidson County
No. 96C-3528 Mary Ashley Nichols, Special Judge

No. M1999-01581-COA-R3-CV - Filed September 25, 2001

This case arises from a medical malpractice suit in which defendant's motion to dismiss was granted pursuant to Tenn. Code Ann. § 29-26-115 after plaintiff's sole expert was excluded from testifying because his testimony was based on a national standard of orthopedic care. For the reasons below, we affirm the lower court's decision to exclude the plaintiff's medical proof. We also affirm the dismissal of the case.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., and WILLIAM B. CAIN, JJ., joined.

Mary A. Parker, Nashville, Tennessee, Richard D. Piliponis, Mt. Juliet, Tennessee, for the appellant, Jackie Robinson.

C. Hayes Cooney, Nashville, Tennessee, for the appellee, Patrick J. Lecorps, M.D.

OPINION

The plaintiff's medical malpractice complaint was dismissed after the trial court granted the defendant's motion *in limine* to exclude the evidentiary deposition of plaintiff's only expert witness. If the expert's testimony was properly excluded, the plaintiff would be unable to meet his burden of proof on the elements of medical malpractice. The basis for the trial court's exclusion of the testimony of the expert was the failure of the expert to demonstrate knowledge of the standard of care in Nashville, the community where the defendant practices. The background relevant to our consideration of this appeal is as follows.

Plaintiff, Jackie Robinson, an inmate at Riverbend Maximum Security Institute, injured his ankle when it was caught and twisted between two railroad ties on March 11, 1994. He was first treated in the prison infirmary by a nurse. Several days later an x-ray was ordered, and he was treated conservatively by Dr. Frank Thomas. When the x-ray revealed a fracture, Mr. Robinson was

transported to Meharry Medical Center for treatment by defendant, Dr. Patrick LeCorps. Dr. LeCorps was under a contract with the Department of Correction to provide health care to inmates.

On March 15, Dr. LeCorps set the fracture, applied a long leg cast and ordered a re-examination in two weeks. On March 22, 1994 Dr. LeCorps performed a closed reduction procedure. Mr. Robinson purportedly suffered continued pain prior to his next visit on April 5, at which time Dr. LeCorps removed the long cast and reset the ankle with a short cast. On April 15, Mr. Robinson removed the cast himself after it got wet. When Dr. LeCorps examined the ankle on April 19, Mr. Robinson complained of pain and was prescribed medication. On May 3, Mr. Robinson again complained of pain and was prescribed more medication. However, Dr. LeCorps told him that the fracture was fully healed as evidenced by an x-ray. Thereafter, Mr. Robinson continued to complain of pain to workers at the prison infirmary. He was seen by Dr. LeCorps on July 5, 1994 and complained of pain when turning his foot and on ambulation, but Dr. LeCorps stated there was no neurovascular deficit.

In December 1994, Mr. Robinson was transported to Meharry again after experiencing pain. He was treated by Dr. William Bacon who diagnosed post-traumatic arthritis in Mr. Robinson's ankle. In November 1995, Mr. Robinson underwent an arthrodesis, a procedure in which his ankle joints were fused.

In September 1996, Plaintiff commenced the underlying action, asserting that Dr. LeCorps' treatment of his ankle was negligent. Subsequently, Plaintiff identified his sole medical expert witness as Dr. William Kennedy and provided Dr. Kennedy's report, which included his statement that he was a licensed orthopedic physician actively practicing medicine in Tennessee during the year preceding March, 1994. In February 1999, the evidentiary deposition of Dr. Kennedy was taken. Dr. Kennedy has practiced in the state Tennessee since 1972, primarily in Johnson City. He is certified by both the American Board of Orthopedic Surgery and by the American Board of Independent Medical Examiners. He retired from the practice of orthopedic surgery in 1998. His current practice was confined to independent medical examinations, including related testimony where needed. He has provided testimony in a number of cases, including three cases in Davidson County, as an expert witness.[1]

He testified in this case, in pertinent part, as follows:

> Q: Based on your review of the records and your experience as an orthopedic surgeon, what is the recognized standard of acceptable professional practice in orthopedic surgery in Nashville, Tennessee, in March, 1994, in view of the condition of Mr. Robinson's ankle when he presented to Dr. LeCorps on 3/16/94?

[1]It is not clear if that testimony was given in medical malpractice cases. Only one to two percent of Dr. Kennedy's time was spent testifying as an expert in malpractice cases.

Mr. Cooney: I object to that testimony on the basis he testified in his discovery deposition[2] and his opinions were based on the national standard.

Q: Do you consider the national standard to be the same as the recognized standard of acceptable professional practice as it would be in Nashville, Tennessee?

Mr. Cooney: Same objection, based on his prior deposition.

A: Yes.

Q: What do you base that on, that opinion?

A: Nashville is certainly recognized as a regional medical center, and communication and training are such in our country today that the two standards, locally, as held in Nashville and for that matter where I have practiced in Johnson City, would be expected to be the same, and also the same as the national standard.

There is no differentiation recognized in our profession of one locality as opposed to the other, certain localities comparable with Nashville and Johnson City, Tennessee, on the part of any of our national organizations including the American Board of Orthopedic Surgery.

All of us, whether we are from Johnson City or from Nashville, would stand the same test and would be expected to have the same knowledge and to practice in very similar fashions by the American Board of Orthopedic Surgery.

Mr. Cooney: Same objection.

Q: . . . What is your opinion as to the recognized standard of acceptable professional practice in Nashville in March, 1994, when Mr. Robinson appeared–presented to Dr. LeCorps?

Mr. Cooney: Same objection.

A: In my opinion the standard of care would have called for a closure of the ankle mortise and a restoration of the normal anatomy of the ankle including the reduction of the fracture of the lateral malleolus. That could have been done, as I previously stated, either by closed method or by open method. But the ankle is an - is an unforgiving joint and can be expected to yield to an arthritic condition if following an injury which disrupts the ankle mortise as this one did, the normal anatomical relationships are not restored within the ankle joint.

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[2]No discovery deposition is included in the record.

On the day scheduled for trial, February 23, 1999, the court considered defendant's motion *in limine* to exclude the evidentiary deposition of Dr. Kennedy[3] on the grounds that his testimony was based on a national standard of care and was therefore inadmissible under Tenn. Code Ann. § 29-26-115 (1996 & Supp. 2001). The trial court granted the motion on March 15, 1999, "on the grounds that he testified that he was basing his opinion on a national standard of orthopedic care and, therefore, said opinion standing alone did not meet the requirements of the Tennessee Medical Malpractice Act, Tenn. Code Ann. § 29-26-115 . . ." Specifically, the trial court cited *Cardwell v. Becktol*, 724 S.W.2d 739 (Tenn. 1987) and *Mabon v. Jackson-Madison County General Hosp.*, 968 S.W.2d 826 (Tenn. Ct. App. 1997). The trial court also granted plaintiff's motion for interlocutory appeal on this issue, which was denied by this court.

Days later, Dr. LeCorps moved to dismiss arguing that Mr. Robinson had no expert medical proof to support his claim that Dr. LeCorps breached the standard of care and would be unable to make out a medical malpractice claim without the testimony. In response, Mr. Robinson asked the court for the opportunity to call Dr. Kennedy to testify at trial to establish the applicable standard of care and Dr. LeCorp's breach of such standard. Dr. LeCorps's Motion to Dismiss was ultimately granted. Mr. Robinson appeals arguing that the trial court abused it's discretion by excluding Dr. Kennedy's deposition testimony and by not allowing Dr. Kennedy to testify live at trial as to the proper standard of care. For the reasons set forth below, we find that Dr. Kennedy did not adequately testify as to support a finding that he had the requisite knowledge of the standard of care in Nashville, Tennessee, and, therefore, his testimony was properly excluded. Further, we find no error in the granting of the defendant's motion to dismiss.

I.

The trial court has broad discretion in determining the "admissibility, qualifications, relevancy and competency of expert testimony," and we will not reverse that decision unless there is an abuse of that discretion. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997); *Shelby County v. Barden*, 527 S.W.2d 124, 131 (Tenn. 1975). "Abuse of discretion" does not denote intentional wrong, bad faith or misconduct on the part of the trial court. *Foster v. Amcon Int'l, Inc.*, 621 S.W.2d 142, 145 (Tenn. 1981). Instead, it "simply mean[s] an erroneous conclusion or judgment on the part of the trial judge . . . " *Id.*

Abuse of discretion standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the trial court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). While we will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation,

[3]The court also granted the plaintiff's motion to exclude the testimony of the defendant's medical expert, Dr Lance Weaver, because he had practiced in California, not Tennessee, the year prior to the injury. Tenn. Code Ann. § 29-26-115(b).

or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative.

II.

Tenn. Code Ann. § 29-26-115(a)(1) states in pertinent part:

> (a) In a medical malpractice action, the claimant shall have the burden of proving [by qualified expert testimony]:
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred.

This "locality rule" component of the statute is part of the requirement that a malpractice plaintiff show "that the defendant failed to act with ordinary and reasonable care when compared to the customs and practices of physicians from a particular geographic region." *Sutphin v. Platt*, 720 S.W.2d 455, 457 (Tenn. 1986). The legislative purpose underlying this requirement has been described by our Supreme Court: "There is an undeniable legitimate state interest in assuring that doctors charged with negligence in this State receive a fair assessment of their conduct in relation to community standards similar to one in which they practice." *Sutphin*, 720 S.W.2d at 457.

The actual issue determined by the court in *Sutphin* was the constitutionality of a different legislatively prescribed limitation on the competency of an expert in medical malpractice actions: that found in Tennessee Code Annotated § 29-26-115(b).[4] That section requires that the testifying expert be licensed to practice in Tennessee or a contiguous bordering state during the year preceding the alleged injury. The Court began its analysis of this expert competency requirement with consideration of its relationship to the locality rule, and described the locality rule as follows:

> This geographic component to the relevant standard of care evolved out of a recognition that the medical customs or practices varied depending on the particular area in which the physician practiced. Traditionally, the relevant geographic area was strictly defined. The plaintiff was required to introduce evidence concerning the standard of care in the strict locality where the defendant worked. However, in light

[4]In *Sutphin*, the plaintiff argued that the geographical limitation on the competency of experts was unconstitutionally arbitrary and irrational because it exceeded the implicit requirement stated in the locality rule. She maintained that the expert's state of licensure was irrelevant as long as the expert had knowledge of the standards in communities similar to the defendant's. After admitting the logic of that argument, the Court determined, however, that its responsibility was to apply the rational basis test to the geographic competence requirement. Having found a legitimate state interest in the locality rule requiring an expert to have knowledge of local standards, the Court found that the legislature may have determined that physicians licensed in Tennessee or bordering states were most qualified to render an opinion on the standard of care applicable to a Tennessee doctor. The resulting potential for reduction in inaccurate testimony was determined to be reasonably related to the legitimate state interest in ensuring fair trials.

> of a modern trend towards the national standardization of medical practices, especially in specialties, courts and legislatures have gradually expanded the relevant geographic area for providing the medical standard of care. Indeed, the Tennessee legislature has adopted a somewhat broadened definition of the geographic component to the medical standard of care, requiring proof of "[t]he recognized standard of acceptable professional practice . . . in the community in which [the defendant] practices or in a similar community. . . ."

Sutphin, 720 S.W.2d at 457 (internal citations omitted; emphasis added).

The trial court herein relied on two cases. The first, *Cardwell v. Bechtol*, 724 S.W.2d 739 (Tenn. 1987), involved a malpractice action against an osteopath, wherein the court excluded testimony from an orthopedic specialist and a neurologist who both admitted that they were not familiar with the practice and types of treatments, nor the standard of care, of osteopaths. *Id*. at 752, 754. Thus, we find the *Bechtol* case has little relevance to the issue presented herein.

The second case relied on by the trial court was *Mabon v. Jackson-Madison County General Hosp.*, 968 S.W.2d 826, 830-31 (Tenn. Ct. App. 1997) (*perm. app. denied* April 20, 1998). In that case, this court found that the expert's testimony was excluded because the expert demonstrated "a complete lack of knowledge of Jackson's medical community." The expert, a Dr. Shane, testified on cross examination that he did not know the population of Jackson, did not know the number of hospitals in Jackson, if there was a medical school there, the number of doctors in Jackson, had never been to Jackson, did not know any physicians there, and had never treated a patient there. *Id*. at 830-31. Based on such testimony, the court held

> To qualify as an expert, a physician is not required to be familiar with all of the medical statistics of a particular community. However, a complete lack of knowledge concerning a community's medical resources would be contrary to knowledge of the required standard of care. The plaintiff's tendered expert must be familiar with the standard of care in the community in which the defendant practices or in a similar community.
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> *****
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> In this case, Dr. Shane's deposition testimony leads us to conclude that he is not familiar with the standard of care in Jackson, Tennessee. Moreover, we cannot accept Dr. Shane's bare assertion that the standard of care in Jackson is the same nationwide and that the level of care with which Dr. Shane is familiar should have been available in Jackson.

Id. at 831. Thus, in *Mabon*, the expert's testimony was excluded because his testimony was based solely on his knowledge of a national standard of care. He stated in his affidavit that the defendant doctor failed to meet the standard of care that "should have been available in a city the size of Jackson, Tennessee." The court found this statement significant as indicative that the expert's testimony was premised on the national standard and not on the applicable local standard. The

expert also readily admitted his complete lack of knowledge of Jackson's medical community. This court concluded the expert's testimony did not provide the requisite basis for knowledge of local standards. *See also, Ayers v. Rutherford Hospital, Inc.*, 689 S.W.2d 155, 159, 162-63 (Tenn. Ct. App. 1984) (*perm. app. denied* April 22, 1985) (expert testified he knew nothing about the size of the city of Murfreesboro, the size of the hospital, had never been there and did not know anyone who practiced there).

In other cases, a proposed expert's reliance on a national standard of care has also resulted in the exclusion of that expert's testimony. For example, in *Osler v. Burnett*, No. 02A01-9202-CV-00046, 1993 WL 90381 (Tenn. Ct. App. March 30, 1993) we affirmed the trial court's summary judgment excluding the testimony of an expert who "readily admitted" he was not familiar with the medical standards in the city in which the defendant practiced. *Id*. at *4. We held the expert simply failed to establish that he had knowledge of the requisite standard of care. In *Spangler v. East Tennessee Baptist Hospital*, No. E1999-01501-COA-R3-CV, 2000 WL 222543 (Tenn. Ct. App. February 28, 2000), we affirmed the trial court's finding that the plaintiff's expert was not qualified to testify as an expert because the expert's belief that he was familiar with the standard of care in the defendant's locality was based solely on his conclusion "that standard of care did not vary from community to community." We specifically stated that the expert "presented no other factual basis that he was familiar with the local standard of care, and there is no proof whatsoever in the record that would explain how the witness, a physician from Washington, D.C., would be familiar with the standard of care in Knoxville." *Id*. at *2.

In all the cases described above, the expert was shown to have no knowledge of the standard of care in the defendant's community or in a community shown to be similar. Thus, these holdings stand for the proposition that an expert's knowledge of the national standard of care, even coupled with a bare assertion that the national standard applied to the defendant's community, was not sufficient to establish the requisite knowledge of the local standard where the facts demonstrated no knowledge of the locality or similar localities. As this court has recently stated:

> Although this Court has "admonished lawyers to couch their medical experts' conclusions in the language of" the statute, we realize that "a mere ritualistic incantation of statutory buzz evidences very little." Rather, we must look at the expert's opinion to determine if it is based upon "trustworthy facts or data sufficient to provide some basis for the opinion."

Roberts v. Bicknell, No W2000-02514-COA-R3-CV, 2001 WL 935345, at *7 (Tenn. Ct. App. Aug, 16, 2001) (internal citations omitted). The expert in *Bicknell* "candidly admitted" to knowing nothing about the practice of medicine in the community where the defendant practiced. The specifics of this complete lack of knowledge were established, as in *Mabon*, by cross-examination, and the testimony was nearly identical to that of the proposed expert in *Mabon*. Stating that the law of expert witnesses "requires the expert to have *some* knowledge of the practice of medicine in the community at issue or a similar community," this court concluded the expert's testimony did not meet that standard. *Id*. at *8.

In another recent opinion, this court closely examined an expert's testimony regarding the applicable standard of care to determine if there was sufficient proof that Lexington, Kentucky, where the expert practiced, was similar to the locality of defendant's practice, Memphis, Tennessee. *Wilson v. Patterson*, No. W2000-02771-COA-R3-CV, 2001 WL 912807 (Tenn. Ct. App. Aug. 10, 2001). In that case, the expert, Dr. Swan, first testified that a national standard was applicable. *Id.* at *3. Later, he submitted affidavits that clarified that the standard in Lexington, Kentucky, and Memphis, Tennessee, were the same as the national standard. Further, he was familiar with the standard in Memphis because, like Lexington, it was a regional medical center, had a medical school and he had testified in trials there, which involved reading medical records and depositions of other doctors in the area. *Id.* at *3. Defendant attempted to strike the testimony contained in the affidavits as being in contradiction to his deposition testimony regarding a national standard. *Id.* at *7-8. This Court did not find the statements to be in contradiction to each other, but instead, found that the affidavits explained the deposition testimony. *Id.* Further, while Dr. Swan's testimony on the similarities between the medical communities of Lexington and Memphis was "somewhat meager," it was determined to be enough to survive dismissal on summary judgment. *Id.* at *9.

The analysis in *Patterson* is similar to that employed earlier in *Ledford v. Moskowitz*, 742 S.W.2d 645 (Tenn. Ct. App. 1987), wherein this court reversed a trial court's determination that the plaintiff's expert was insufficiently familiar with the standard of care in the applicable locality (Cleveland, Tennessee). Commenting on the expert's admission that he had never been to Cleveland and did not know the number of hospitals or doctors there, this court emphasized that "precise knowledge of the specific medical statistics of a particular community . . . is not a requirement of the statute." The expert had testified that his Atlanta practice involved referrals from small towns outside Atlanta and that he was familiar with the standard of care in small towns all over Georgia. Therefore, he stated he was familiar with the standard of care in Cleveland "in a broad sense." This court found that "taken as a whole, [the expert's] proof creates a material issue of fact on the standard of acceptable psychiatric practice in similar communities to those found in Polk, McMinn, and Bradley county area[s]. Although medical malpractice actions impose more rigorous procedural requirements on the plaintiff, once the threshold of proof has been crossed; as it has been here by Plaintiff's expert . . . then the case should proceed to trial on the merits." *Id.* at 649.

We do not conclude that a physician's reference to a national standard automatically excludes that doctor's testimony on the basis of the locality rule. As early as 1986, our Supreme Court recognized a trend toward the "national standardization of medical practices, especially in specialties." *Sutphin*, 720 S.W.2d at 457. However, the medical profession's trend does not eliminate the statutory requirement that a medical malpractice plaintiff establish through expert testimony the standard of acceptable practice in the community where the defendant practices or a similar community.

The question is whether the expert possesses knowledge of the standard in the relevant community. The expert must have "some knowledge" as a basis for his or her opinion on the applicable standard. The purpose of the locality rule is to insure that "doctors charged with negligence in this state receive a fair assessment of their conduct in relation to community standards

similar to the one in which they practice." *Sutphin*, 720 S.W.2d at 458. Whether the proposed expert can provide the basis for such a "fair assessment" is the fundamental issue to be determined by the court in ruling on the admissibility of the expert's testimony.

As the authorities discussed above make clear, an expert's knowledge of the standard in a particular locality based solely on the expert's knowledge of the national standard and his or her belief that the national standard should apply in the relevant locality do not demonstrate knowledge of the local standard. After reviewing Dr. Kennedy's testimony thoroughly, we can find no other basis for his knowledge of the standard of acceptable practice in Nashville. He did not say he was familiar with that standard or that he was familiar with the Nashville medical community. He stated that the standard in Nashville "would be expected to be the same . . . as the national standard."

It is the role of the trial court to review and determine the trustworthiness of the factual basis for an expert's testimony. *McDaniel v. CSX Transp., Inc.*, 995 S.W.2d at 265. Herein, Dr. Kennedy provided no factual basis for his knowledge of the standard of care in Nashville. Therefore, the trial court acted well within its discretion in excluding Dr. Kennedy's testimony, and we affirm that decision.

III.

Because we affirmed the dismissal of Mr. Robinson's case on the first ground, we must now decide whether or not the court erred in not allowing plaintiff's request to have Dr. Kennedy testify live at trial. We find no abuse of discretion by the trial court in not allowing any further testimony by Dr. Kennedy and dismissing the cause of action.

It is well settled, and plaintiff readily admits in his brief, that it is in the trial court's discretion to allow additional evidence. *State v. Brock*, 940 S.W.2d 577, 580 (Tenn. Crim. App. 1996) and *State v. Baker*, 785 S.W.2d 132, 136 (Tenn. Crim. App. 1989) (both citing *State v. Bell*, 690 S.W.2d 879, 882 (Tenn. Crim. App.1985) (*perm. app. denied* Apr. 1, 1985)); *Winchester v. Winchester*, No. 02A01-9802-CV-00046, 1999 WL 250176, at *12 (Tenn. Ct. App. Apr. 28, 1999) (*perm. app. denied* Oct. 4, 1999). Our Supreme court has stated that a decision to not allow additional evidence may be set aside when "there is a showing that an injustice has been done." *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 149 (Tenn. 1991). We do not find that to be the case here.

Mr. Robinson was well aware of potential problems with Dr. Kennedy's testimony. Therefore, there were ample opportunities to present further testimony to explain his familiarity with the standard of care in Nashville. First, Mr. Robinson was most certainly aware of the statutory requirements to qualify as an expert in a medical malpractice case under Tennessee Code Annotated § 29-26-115. Second, Dr. LeCorps objected at the evidentiary deposition based on the testimony Dr. Kennedy was providing, and apparently had also given in the discovery deposition. The objection was clear and concise as required and stated an objection "on the basis he [Dr. Kennedy] testified in his discovery deposition his opinions were based on a national standard." At that time, Mr.

Robinson could have asked more detailed questions to explain how and why Dr. Kennedy was familiar with the standard of care in Nashville, and even why he knew that (rather than expected) the Nashville standard was the same as the Johnson City or the national standard, for that matter. However, no such questions were asked. Finally, Mr. Robinson was made aware of the specific argument and objection of Dr. LeCorps prior to trial as evidenced by the motion *in limine* to exclude the testimony of Dr. Kennedy. As in some of the cases discussed above, Mr. Robinson could have produced an explanatory affidavit from Dr. Kennedy in response to the objections or the motion or could have notified counsel and the court that Dr. Kennedy may be called to testify in person at trial. The record does not reflect that any of these measures were taken.

Therefore, we see no evidence of an abuse of discretion on behalf of the trial court to not allow additional evidence after these opportunities had already passed. We affirm the trial court's dismissal of this cause of action based upon plaintiff's inability to meet his burden of proof by expert testimony.

IV.

This cause is affirmed and remanded to the trial court for actions not inconsistent with this opinion. The costs of this appeal are taxed to the appellant, Jackie Robinson, for which execution shall issue if necessary.

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PATRICIA J. COTTRELL, JUDGE